

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**FREMONT HEALTHCARE, LLC
d/b/a TRANSITIONAL HEALTH SERVICES OF FREMONT**

Employer

and

**Cases 7-RC-23237
7-RC-23238¹**

**SEIU HEALTHCARE MICHIGAN, SERVICE
EMPLOYEES INTERNATIONAL UNION, CTW²**

Petitioner

APPEARANCES:

Gregory Richters, Attorney, of Atlanta, Georgia, for the Employer.
Brian Mosby, Attorney, of Indianapolis, Indiana, for the Employer.
Christopher Mikula, Attorney, of Detroit, Michigan, for the Petitioner.

DECISION AND ORDER

Upon petitions filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding³, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

¹ These cases were consolidated for purposes of the hearing and this decision.

² The names of the Employer and Petitioner appear as corrected at the hearing.

³ Both parties filed briefs, which were carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

In Case 7-RC-23237, the Petitioner seeks to represent all full-time and regular part-time registered nurses (RNs) employed by the Employer at its Fremont, Michigan facility. In Case 7-RC-23238, the Petitioner seeks to represent the Employer's full-time and regular part-time licensed practical nurses (LPNs) at the Fremont facility. The Employer contends that all its RNs and LPNs are statutory supervisors and, thus, the units are inappropriate and the petitions should be dismissed. I conclude, for the reasons set forth below, that the RNs and LPNs exercise authority in the interest of the Employer requiring the use of independent judgment to responsibly direct and discipline employees, and thus are statutory supervisors.

The Employer's Operations

The Employer operates a 129-bed, long-term nursing facility in Fremont, Michigan. Administrator Michael Kegley oversees the entire facility. Brenda Franklin is the director of nursing (DON) and Judy Pykonen is the assistant director of nursing (ADON). The facility has five residential units: Hall 100, a/k/a Maple; Hall 200, a/k/a Oak; Hall 300, a/k/a Pine; Hall 400, a/k/a J-wing unsecured dementia unit; and Hall 500, a/k/a J-wing secured dementia unit. Unit Manager (UM)/Staff Development Coordinator Bridget Hoogeveen manages Hall 100; UM Jamie Baker manages Halls 200 and 300; and UM Barbara Fitzpatrick manages Halls 400 and 500.⁴ A fourth UM position was recently eliminated by the Employer. Jackie Bulson is the Employer's director of admissions, and Terry Miller is the business office manager. The Employer also employs two medical records/ward clerks: Sue DeJong covers Halls 100, 200, and 300, and Shawn Sutherland covers Halls 400 and 500 of the J-wing. Sutherland is also the scheduler for the entire nursing department.

The 8 RNs and 11 LPNs, also referred to as charge nurses⁵, have the same duties, with the exception that only RNs start and maintain resident IVs and PICC lines. One or two nurses work on each unit each shift depending on the patient census and the shift. Most nurses work eight-hour shifts, 6:15 a.m. to 2:30 p.m., 2:15 p.m. to 10:30 p.m., and

⁴ The parties stipulated, and I find, that Judy Pykonen, Bridget Hoogeveen, Jamie Baker, and Barbara Fitzpatrick are supervisors based on their authority to discipline and effectively recommend hire and termination.

⁵ RNs and LPNs are collectively referred to as nurses for purposes of this decision.

10:15 p.m. to 6:30 a.m. There are three night shift nurses who “float” the entire nursing department from 6:00 p.m. to 4:00 a.m.: Randi Legard, Sue Crane, and James Foster.⁶ They are designated as night shift nurse supervisors. Each unit is also staffed by certified nurses aides (CENAs). There are approximately 40 full-time and 26 part-time CENAs employed at the facility. One to three CENAs work on each unit depending on the patient census and the shift. They work the same eight-hour shifts, starting five minutes later than the nurse shifts. During the 6:15 a.m. to 2:30 p.m. shift, 14 CENAs are scheduled, including one floater CENA. From 2:15 p.m. to 10:30 p.m., 12 CENAs are scheduled, including one floater CENA. From 10:15 p.m. to 6:30 a.m., six CENAs are scheduled, including one floater CENA. The nurse to CENA ratios are set by the UMs in accordance with the State of Michigan staffing guidelines regarding resident to caregiver ratios, as well as the facility’s budget. The CENAs are subject to a collective bargaining agreement between the Employer and Local 79, Service Employees International Union (Local 79).⁷

From approximately 5:00 p.m. until 7:00 a.m., there usually are no managers on the premises. At those times, the DON, as well as a unit manager, is always on-call by pager and/or telephone should a situation arise that requires attention. A weekend manager is on duty at the facility every Saturday and Sunday for four hours. The position rotates among 16 managers and/or department heads in the nursing, housekeeping and laundry, maintenance, admissions, dietary, and activities departments.

Residents’ Care

The record is limited regarding who is primarily responsible for assessing patients upon admission and creating their care plans. The UM job description states under “Care Plan and Assessment Functions” that the UM is responsible for ensuring that care plans are completed within required days of admission and that nursing personnel are aware of the care plan and refer to it in administering daily care to the residents. The RN and LPN job descriptions state that the nurses are responsible for conducting and documenting a thorough assessment of each patient’s medical status upon admission and assisting in the development and implementation of an individualized treatment plan for each assigned resident.

A night shift nurse is responsible for making a vital sign chart of all the residents and posting it for all shifts. There is information on the vital sign chart that the CENAs need to obtain as part of their job duties. The daily assignment sheet posted by scheduler

⁶ Randi Legard is a full-time RN, Sue Crain is a full-time LPN, and James Foster is a “PRN” RN who is on-call and fills in for Legard and Crane when they are absent. James Foster’s last name was not known at the hearing and is noted in the parties’ briefs.

⁷ I take administrative notice that Local 79 is now known as SEIU Healthcare Michigan, Service Employees International Union, CTW (Petitioner)) and its health care collective bargaining agreements are now serviced by the Petitioner.

Shawn Sutherland, along with the vital sign chart, activities of daily living (ADL) charting book, and bathing chart, lists the routine tasks and duties of the CENAs. CENAs document resident care by initialing the care provided on ADL flow sheets and inputting vitals onto the vital sign board. For the most part, CENA job duties are routine, including taking and charting vitals, skin checks, toileting, changing, bathing, clothing, feeding and walking residents, and changing bedding. Nurses are responsible for updating the CENAs when a resident's condition changes and amending their assignments noted on the assignment sheets and charts, if necessary, in accordance with resident condition changes. Most amended assignments are communicated orally by the nurse to the CENA and include additional routine duties.

Upon starting their shifts, nurses speak to the nurses on the outgoing shift and discuss any changes in the condition of the residents. Nurses share this information with CENAs. Likewise, CENAs inform nurses when they see changes in residents, such as skin conditions. Nurses use their discretion to treat these and other resident condition changes. Nurses spend most of their day providing patient care, including passing medications, performing treatments, patient assessments, and skin checks. Based on availability of CENAs, nurses sometimes direct CENAs to stay with a resident one-on-one or otherwise change a resident's care if it is medically required. However, approximately one-third to one-half of the CENAs at the facility are "position holders" who hold permanent full-time CENA positions under the collective bargaining agreement and cannot be requested to take a different position. Nurses direct CENAs concerning specific information about vitals the nurses may need.

Nurses contact the DON during the day or the on-call manager during off-hours to update them regarding changes in a resident's condition as well as emergencies, such as a resident fall, seeking doctor or hospital care for a resident, the death of a resident, or building issues such as a fire or alarm problems. If someone becomes violent in the facility, anyone can call 911, and then a call must be made to the DON or the administrator to inform her or him of the incident.

UM Baker conducts monthly meetings with the CENAs and nurses to discuss resident care and employee personnel issues. Initially, the CENAs and nurses are together for the meeting. The CENAs are then dismissed and the nurses stay at which time they receive information regarding staffing, resident, and policy issues, and to discuss nursing responsibilities. The DON holds monthly meetings with the UMs to discuss management and personnel issues and policies. Nurses do not attend these meetings. Administrator Kegley holds daily "stand-up" meetings to discuss the daily events taking place within each department at the facility. These meetings are attended by managers and department heads including the DON, ADON, and UMs from the nursing department; activities director; dietary director; maintenance/environmental services director; billing office manager; director of admissions; and director social services. Nurses do not attend these meetings.

Scheduling and Assignments

The daily assignment sheet created and posted by scheduler Sutherland also lists the shift, unit and for which group of resident rooms each CENA is responsible, in addition to work assignments⁸. Residents are grouped into group numbers. The group numbers, resident unit, and the assigned CENAs are written on the assignment sheets. The floater CENAs also receive their assignment from the daily assignment sheet and are primarily assigned to Halls 400 and 500 of the J-wing because there is greater need for additional coverage in the dementia unit. The floaters can be requested to assist in another wing if needed.

In response to resident complaints or resident care issues, the nurses may make a temporary readjustment of a CENA's assignment, subject to the position holder restrictions set forth in the CENA collective bargaining agreement. However, the UMs and DON are responsible for making any permanent CENA transfers, also subject to restrictions contained in the CENA contract. There is some evidence that nurses occasionally rotate additional assignments among the CENAs, including applying oxygen support, or monitoring blood pressure more frequently. CENAs decide among themselves when they will take their scheduled breaks and report to nurses when they go on break or lunch.

If a CENA calls the facility during the day and indicates that he or she will be absent and the unit is short-staffed, Sutherland is responsible for handling the call. If there is a call-in after-hours or on the weekend, when no managers are in the building, the employee accepting the call completes a call-in slip and gives it to the J-wing nurse who is responsible for handling the call. Once the call is received, Sutherland or the J-wing nurse will either rearrange the scheduled staff in the unit affected by dividing the number of residents among the number of available CENAs, or, if the call-in brings the staffing ratio of employees to resident to levels below state minimums, an additional CENA for the affected shift will be called into work, or a CENA from the previous shift will be mandated to stay over. When an additional CENA is not necessary according to census numbers, the CENAs and/or the nurses divide up the extra work among the remaining CENAs. There is some evidence that nurses occasionally transfer CENAs between units when shortages exist. However, the weight of the evidence shows that the nurses and CENAs on the first and second shifts are generally able to divide up the extra work among the remaining CENAs without any difficulties. Regarding the third shift, there is not as much flexibility to rearrange CENAs when there is a call-off as there is only one assigned CENA per unit. Consequently, it becomes necessary for the nurses on the third shift either to call in CENAs for third shift coverage, or mandate that a second shift CENA stay over, more often than nurses do on the first and second shifts.

⁸ First shift and second shift assignments are on the same assignment sheet. There is a separate assignment sheet for the third shift. Sutherland posts the assignment sheet every two weeks, one week before the schedule is to start.

One Employer witness testified that when there are no department heads on premises at the facility, the nurses are not only the highest ranking supervisors on-site over the CENAs, but they are also responsible for the housekeeping and dietary employees on-site, including handling any call-ins from those departments and finding replacement employees if necessary. However, the record is clear that the night shift and weekend nurses on duty are to notify the appropriate department director for guidance in handling any non-nursing department issues.

There is a fixed call-in procedure for mandating employees to come in or stay over their scheduled shifts. This is also known as the mandation procedure. A “mandation list” lists CENA names by their part-time or full-time status and seniority dates. The list starts with part-time employees who would not be incurring any overtime and then goes to full-time employees from high to low seniority dates. Nurses are not required to have management authority to mandate an employee to stay over shift or come into work because employee mandation is determined by the census numbers and state minimum staffing levels. Thus, there is no discretion concerning which CENA will be called in or requested to stay over because nurses are required to select employees according to the list. CENAs who are called to come into work and refuse to do so are subject to discipline. Nurses are supposed to document refusals to come in to work. However, the nurses have no authority to issue discipline in this regard. Nurses are not authorized to approve overtime for any CENAs.

CENAs who request to leave before the end of their scheduled shift, for personal or other reasons, are required to complete a call-in slip. The CENA turns in the slip to the nurse on her unit who crosses the CENA’s name off of the schedule. Some nurses advise the CENA that s/he may be subject to an absentee demerit point for leaving early. However, the decision to apply any demerit points is left to upper nursing management. The Employer contends that one night shift nurse recommended that a CENA receive a demerit point for leaving early. However, the nurse was not asked for the recommendation, and the discipline that eventually issued was beyond the nurse’s recommendation.

Direction and Discipline of CENAs

CENAs perform their work from the daily assignment sheet, vital signs chart, ADL charting book, and bathing chart, and prioritize their own work. When CENAs complete their tasks, they are required to input them onto the ADL flow sheets and vital sign board. Nurses have the responsibility to tell CENAs to complete their tasks and instruct them on how to do some of the work, such as the proper use of medical equipment or the method for turning a patient. Nurses assist CENAs with combative patients and seek help from other staff members if needed.

If a nurse believes that a CENA is not providing adequate care, improperly conducting procedures, or not completing tasks in a timely manner, the nurse can choose to do nothing; verbally counsel⁹ the CENA who is responsible for that resident's care; submit a written comment to a UM or the DON; or she can complete a corrective action plan (CAP) for that CENA, describing the CENA's conduct, and submit it to the DON or UM. Nurses have been disciplined for the conduct of CENAs. In that regard, the record contains four written CAPs issued to nurses by either a UM or the DON. Two write-ups were for failing to supervise CENAs to make sure they recorded resident intake/outtake information and vitals on the board; one write-up was for failing to direct CENAs who were watching television when they should have been working; and one write-up generally stated it was for failing to supervise staff, without any additional details.

CAPs are the official disciplinary forms used for all employees at the facility up to and including the DON. Nurses do not need approval from their superior to write a CAP. If the nurse decides to write a CAP regarding a CENA, it becomes part of the progressive discipline process. The nurse completes the CAP by describing the issue in writing on the form under "reason for corrective action," filling out the "expected level of performance" portion of the form, and signing it. The bottom portion of the form noting the specific corrective action is left blank.

Once a nurse fills out a CAP, she gives it to either the DON or UM. The DON completes the discipline without further investigation, by reviewing the CENA's personnel file, including what level of discipline the employee is at, checking off the level of discipline being given on the corrective action form, and providing the completed discipline to the CENA herself or to the nurse to provide to the CENA.¹⁰ The DON will impose the type of disciplinary action that needs to be taken against the employee in question, and then will place the form in the CENA's personnel file. Nurses do not have access to any employee personnel files which are kept in the business office by business office manager/payroll clerk Terry Miller.¹¹

Under the Employer's policy, as well as state-mandated regulations, nurses must immediately send home employees whom they suspect are inebriated or involved in resident abuse. All complaints concerning the abuse of residents must be reported to the DON. Once an employee is sent home, an independent investigation is conducted by a higher nursing management official. The reporting nurse is not involved in the

⁹ The Employer refers to verbal counseling also as verbal coaching or providing an educational opportunity.

¹⁰ Some nurses discuss the CAP with the CENA involved and obtain the CENA's signature on the CAP prior to giving the form to the DON or UM. The nurse does not provide the CENA with any information regarding the level of discipline because nurses do not have access to employee personnel files documenting disciplinary history.

¹¹ New forms, called employee coaching forms, recently replaced the CAP forms within the week of the instant hearing. The new employee coaching forms apparently note four levels of coaching until an employee is subject to termination. However, the new coaching forms were not introduced into evidence. While the Employer claims that some nurses have issued these new coaching forms to CENAs, and some UMs have issued them to nurses, there is scant evidence regarding higher management review of the alleged infractions and forms.

investigation. DON Franklin testified that a nurse has the ability to direct a disrespectful CENA to punch out and leave the facility without checking with a manager. However, there was no evidence that this has ever happened without conferring with a manager first and Franklin admitted that it has not happened since she became the DON in August 2007.

Evaluation of Nurses

The UMs evaluate the nurses annually. Nurses receive an evaluation on the same form as those given to CENAs. One of the six areas of performance that are evaluated is “Leadership Skills.” The Employer maintains that this area of the evaluation rates supervisory ability. The CENAs are not evaluated regarding leadership skills. Upon completion of the evaluation, the UM discusses it with the nurse and then returns it to the DON for further review and placement in the employee personnel file.

Evaluation of CENAs

The Employer evaluates CENAs annually on their anniversary dates. The DON initiates the CENA evaluation process by either completing an evaluation form for the CENA herself, or providing the form to either a UM or a nurse on that CENA’s unit. Some nurses regularly provide input into the evaluations of their CENAs while others have not. The practice appears to be inconsistent at best. Some CENAs have been evaluated exclusively by a UM and/or the DON. There is no evidence that the nurses who have not submitted evaluations have been disciplined for failing to provide input.

A nurse who is involved in the evaluation process fills out the evaluation form and submits it to the UM. The nurses do not have access to employee personnel files when completing evaluations. The UM reviews the input and makes changes if she determines changes are needed. Either the nurse or the UM discusses the evaluation with the CENA. All evaluations, whether completed by a nurse or a UM, go to the DON for independent evaluation. The DON may make her own comments on the evaluation, discuss the evaluation with the nurse or UM evaluator, or may ask the evaluator to make changes to the evaluation. The DON is responsible for placing evaluations in the employee personnel files. The evaluations are not used to determine whether an employee receives a raise as the contract between the Employer and Petitioner provides CENAs with specific raises every 12 months. The Employer contends that evaluations completed by nurses may impact on the DON’s decision to promote a CENA. However, there is no evidence that this has ever happened.

Other Factors

Nurses do not interview or hire employees. They do not lay off or recall employees from layoff. They have no authority to resolve CENA grievances regarding

the grievance procedure set forth in the contract between the Employer and Petitioner. The job descriptions for the nurses state that they supervise and coordinate nursing activities and oversee care delivered by CENAs. The nurses wear badges designating them as charge nurses. The starting wage rate for CENAs is \$11.45. Nurses' wages range from about \$14.00 per hour for some LPNs to approximately \$18.00 for RNs.¹² CENAs and nurses receive the same insurance benefits. Newly hired CENAs are, for the most part, trained on the job by more experienced CENAs.

CENAs and nurses punch an electronic time clock in which they input the last four numbers of their social security number. Whenever the time clock is not functioning properly or an employee makes a mistake in punching the time clock, he/she completes a time punch correction sheet which is initialed by a nurse on the same unit. The nurse initials merely verify the time information recorded by the employee. Nurses initial time correction sheets for each other as well as for CENAs. The time punch correction sheet is then turned into the administrator who reviews all of the sheets and signs off on them himself. A representative of the human resources department then makes and approves the actual adjustment of the employee's time for payroll purposes.

One nurse testified that nurses have access to what the record describes as "accommodation slips" at the nurse stations to document outstanding CENA performance. The slip is turned over to the UM for placement in the CENA's personnel file. However, there is no evidence that these accommodation slips have actually issued to CENAs or have been placed in their personnel files. Moreover, there is no evidence that the accommodation slips are relied upon by upper management in evaluating, rewarding, or promoting the CENAs.

The Night Shift Supervisors

Nurses Randi Legard, Sue Crane, and James Foster work from 6:00 p.m. to 4:00 a.m. as night shift supervisors. They "float" around the entire facility and act as another set of eyes for the night shift nurses. They routinely do the same patient rounds and checks as the other nurses on the night shift and their duties are the same as all of the nurses described above, including patient rounds, skin checks, safety alarm checks, passing medications, performing treatments, assisting CENAs with treatments, checking the ADL flow sheets of CENAs, and checking resident charts. They report directly to UM Baker.

The main difference between the night shift supervisor and the night shift nurse is that the night shift supervisor is required to complete additional facility paperwork, including device sheets and patient monitoring sheets. Device sheets appear to be related to required patient devices such as safety alarms and pressure alarms. Patient monitoring

¹² RNs generally earn about \$4.00 per hour more than LPNs.

sheets appear to be related to census numbers, and patient care issues such as skin checks. Much of this paperwork is required in order to be compliant with state requirements regarding the operation of nursing facilities.¹³ CENAs do not report directly to the night shift supervisors. Consequently, night shift supervisors do not complete and are not involved in any CENA evaluations.

The night shift supervisors have the same authority as nurses to verbally counsel or issue CAP write-ups to CENAs. They have the same responsibilities as the nurses to mandate CENAs to stay over shift or come into work under the pre-set mandation procedure. The record indicates that the night shift supervisors have been advised by upper nursing management that they are not members of management and that they count in the facility's census as direct patient caregivers.

Analysis

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); accord *Kentucky River*, 532 U.S. at 711-712. In addition, the Board’s long recognition that purely conclusionary evidence is not sufficient to establish supervisory status is still viable. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

¹³ The record does not indicate who is responsible for completing this paper work during the day shift.

Assignment of Work

The Board in ***Oakwood Healthcare*** defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” ***Oakwood Healthcare***, supra at 689.

Time

The record establishes that the CENAs’ scheduled hours are determined by the medical records/ward clerk scheduler. The nurses do not schedule CENAs’ work hours, and CENAs and nurses schedule their breaks according to the facility practices. If the facility is short-staffed due to CENAs calling off, the nurses either call in additional CENAs, or the nurses or CENAs divide up the work of the missing CENA. If the nurses call additional CENAs into work, they follow the pre-set mandation procedure using the mandation list. Nurses sign time correction forms for each other and for CENAs when the time clock is not working properly or the employee forgets to punch in or out. However, nurses do not ever have authority to approve overtime work for CENAs, and while they can mandate a CENA to stay over shift for additional coverage, if needed, the pre-set mandation procedure is always required to be followed and the mandation list is used.¹⁴ The Employer has not established the exercise of supervisory authority by nurses in scheduling CENAs. See ***Golden Crest Healthcare Center***, supra, at 728-730.

Place and Tasks

In ***Oakwood Healthcare***, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). ***Oakwood Healthcare***, supra at 695. Here, CENAs are assigned to their unit and resident group by the scheduler. Once CENAs are assigned to rooms, their daily tasks are largely defined by the care plans and charts generated by management. Nurses tell CENAs when residents need changes to their care plans. They may write special instructions or share the changes with the CENAs. Some nurses also occasionally may give CENAs a specific assignment, such as placing oxygen support on a patient and checking the patient to make sure the support stays in place. However, nurses’ assignments of these “discrete task[s]” is closer to “ad hoc assignments” described in ***Croft Metals***, 348 NLRB 717, 721 (2006). In that case, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. ***Croft Metals***, supra at 722. Here, the nurses’ assignments of discrete tasks to CENAs is insufficient to confer supervisory status.

¹⁴ Calling in an employee from the mandation list may result in overtime, but the nurse making the call would not know whether the employee called in will receive overtime.

Similarly, when a unit is short-staffed, there is some evidence that a nurse sometimes may seek to have an additional CENA transferred to the nurse's unit for the shift. However, the record does not establish that any nurse who may choose to transfer a CENA takes into account the CENA's abilities. Any occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not confer supervisory status. *Croft Metals*, supra at 722. The Employer has not established that any isolated temporary reassignment of duties of a CENA for the balance of a shift denotes supervisory status. *Croft Metals*, supra at 722.

In *Oakwood Healthcare*, the Board, consistent with *Kentucky River*, adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare*, supra at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Oakwood Healthcare*, supra at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, supra at 693. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical." *Oakwood Healthcare*, supra at 693.

Independent Judgment

In *Oakwood Healthcare*, the Board found that the term "assign" encompassed a charge nurse's responsibility to assign nurses and aides to particular patients. *Oakwood Healthcare*, supra at 689. The Board found that "if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." *Oakwood Healthcare*, supra at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. *Oakwood Healthcare*, supra at 696-697.

In contrast, the Board found that the emergency room charge nurses did not “take into account patient acuity or nursing skill in making patient care assignments.” The evidence did not show “discretion to choose between meaningful choices on the part of charge nurses in the emergency room.” *Oakwood Healthcare*, supra at 698.

In the instant case, the scheduler, not the nurses, makes initial patient assignments to CENAs. To the extent the nurses make isolated reassignments, the Employer has not shown that they perform a detailed analysis of CENAs’ abilities and residents’ needs. Nurses have greater training and skills than CENAs who do not possess specific training or skills in different medical areas. CENAs may get to know the residents in their assigned group, but there is no evidence that these relationships are taken into consideration by the nurses when reassigning CENAs to a particular task. Rather, the record demonstrates that the CENAs’ assignments are routine in nature and not based on any particular expertise.

I earlier found that nurses do not “assign” by appointing CENAs to a particular time or schedule by giving them significant overall duties. I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. Concerning the nurses’ assignments of CENAs to particular “times” of work, the Board held in *Oakwood Healthcare* that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;” but that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood Healthcare*, supra at 697-698. The initial scheduling, performed by the scheduler, involves no choice at all on the nurses’ part. In addition, the Employer’s practice does not allow for choices by the nurses with regard to calling CENAs into work or requesting them to stay over their shift. The nurses’ limited role in signing time punch correction forms does not constitute a “discretionary choice.” It does not require the use of independent judgment.

As for the assignment of duties, the CENAs’ overall tasks are largely defined by the care plans and standing orders generated by management, not the nurses. In the spectrum set out by the Board, the nurses’ assignment of discrete tasks and the isolated temporary switching of tasks by nurses falls closer to “completely controlled” actions, rather than “free actions.” They do not involve a “degree of discretion that rises above routine or clerical.” *Oakwood Healthcare*, supra at 693. Thus, the assignment of tasks does not require the use of independent judgment.

Evaluation of CENAs

Nurses have provided input into some CENA evaluations. This input includes numerical ratings and written comments. However, the practice appears to be inconsistent. It appears that some nurses regularly provide input into the evaluations of CENAs while others have never provided input or have not provided it in years. Given the inconsistency in participating in the evaluation of CENAs, this evidence cannot be relied upon to establish supervisory authority. ***Chevron Shipping***, 317 NLRB 379, 380 (1995).

Moreover, evaluating employees is not a statutory indicia of supervisory authority. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996); ***Brown & Root, Inc.***, 314 NLRB 19, 21 (1994); ***New York University Medical Center v. NLRB***, 156 F.3d 405, 413 (2nd Cir. 1998).

Responsible Direction and Discipline

In ***Oakwood Healthcare***, the Board interpreted the Section 2(11) phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." ***Oakwood Healthcare***, supra at 690-691. The Board, in agreement with several U.S. courts of appeals, held that, for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. ***Oakwood Healthcare***, supra at 691-692. The Board defined the element of "accountability" as follows:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. ***Oakwood Healthcare***, supra at 692.

The first question is whether the Employer has established that its nurses *direct* other employees within the meaning of Section 2(11). The record demonstrates that the nurses oversee CENAs' job performance and act to correct the CENAs when they are not providing adequate care. For example, a nurse will correct the CENA if she perceives that the CENA is not using proper procedures in transferring a resident. The record also demonstrates that the nurses will direct the CENAs to perform certain tasks when the nurse determines that such tasks are necessary. For example, the nurses will direct

CENAs to apply and check residents' oxygen support, or to change an incontinent resident. This evidence is sufficient to establish that the nurses "direct" the CENAs within the meaning of the definition set forth in ***Oakwood Healthcare. Golden Crest Healthcare Center***, 348 NLRB 727, 731 (2006).

The next question is whether the Employer has established that the nurses are *accountable* for their actions in directing the CENAs. I find that the Employer has met this burden. The Employer presented evidence demonstrating that the nurses are subject to discipline, and some have received discipline, if the CENAs under their direction fail to adequately perform their duties. The record contains evidence of the issuance of actual disciplinary action, four written warning CAPs, issued to three nurses from November 2006 to April 2007, as a result of their performance in directing CENAs. This is evidence of actual accountability as required in ***Oakwood Healthcare***. The "prospect of adverse consequences" for the nurses here is not merely speculative and is sufficient to establish accountability. Accordingly, applying the ***Oakwood Healthcare*** test for responsible direction, I find that the nurses possess the authority to responsibly direct the CENAs. ***Croft Metals***, supra at 722; see, ***Golden Crest Healthcare Center***, supra at 731.

Regarding the asserted disciplinary authority of the nurses, under Section 2(11) of the Act individuals are statutory supervisors if they have the authority, in the interest of the employer, to discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. ***Oakwood Healthcare***, supra at 687; ***Arlington Masonry Supply***, 339 NLRB 817, 818 (2003).

Here, the nurses possess authority to issue written CAPs to CENAs documenting CENA infractions or other issues. These CAPs issued by nurses are relied upon by upper management without conducting any independent investigations and become part of the CENA's progressive disciplinary history. The written CAPs issued to CENAs by nurses are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee. ***Oak Park Nursing Care Center***, 351 NLRB No. 9 (September 26, 2007) slip op. at 2-3; ***Bon Harbor Nursing and Rehabilitation Center***, 348 NLRB 1062, 1064 (2006). The CAP forms themselves are an integral part of the Employer's progressive disciplinary system in that they are used to document each phase of the disciplinary process and routinely result in actual discipline. ***Oak Park Nursing Care Center***, supra, slip op. at 5; ***Starwood Hotels***, 350 NLRB 1114, 1115-1117.¹⁵

Moreover, the nurses here have the discretion to write up an employee infraction on a CAP form. In this regard, the nurses alone decide whether the conduct warrants a

¹⁵ Because the evidence establishes that upper management relies on the nurses' CAP documentation without conducting any additional, independent investigation, the Petitioner's reliance on ***Hillhaven Rehabilitation Center***, 325 NLRB 202 (1997), and ***Northcrest Nursing Home***, 313 NLRB 491 (1993), is misplaced.

verbal counseling or written documentation. Because of this discretion, I find that the nurses are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. *Oak Park Nursing Care Center*, slip op. at 4; *Oakwood Healthcare*, supra at 693 (“the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”). The exercise of independent judgment in initiating an employer’s disciplinary process constitutes a substantial role in the decision to discipline, and is indeed indicative of supervisory authority. *Oak Park Nursing Care Center*, slip op. at 3 and 4.; See *Progressive Transportation Services*, 340 NLRB 1044, 1046 (2003); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004). That some nurses choose not to exercise their disciplinary authority is not determinative as it is the authority to discipline, not the exercise of that authority, that is relevant. See *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 2.

I find that the written CAPs issued to CENAs by nurses as described above have the real potential to lead to an impact on the CENAs’ employment and that the Employer has met its burden to show that, by virtue of this activity, the nurses are statutory supervisors. *Bon Harbor Nursing and Rehabilitation Center*, supra at 1064 (2006).

Secondary Indicia

Further support for the finding of supervisory status is certain secondary indicia of supervisory status. The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). However, they can be a factor and here they are significant. The job descriptions of the nurses note their supervisory authority. *Wedgewood Health Care*, 267 NLRB 525, 526, fn. 11 (1983). For substantial periods on the second and third shifts, and during a majority of the weekend, the nurses are the highest ranking employees at the facility. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047-1048 (1997). The nurses also participate in meetings with UMs, after the CENAs are dismissed from the same meeting, during which managerial and supervisory issues are discussed. *McClatchy Newspapers, Inc.*, 307 NRB 773 (1992).

The Night Shift Supervisors

The night shift supervisors share the same job duties as the rest of the nurses, including overseeing CENA job performance and directing their tasks. The record is unclear as to whether one of the four write-ups issued to nurses regarding CENA failures was directed specifically to a nurse designated as a night shift supervisor. However, given the similarity of the duties between the nurses and the night shift supervisors in regard to their interaction with the CENAs, there is no reason to doubt that such a write-up could issue to a night shift supervisor as well as a floor nurse. Therefore, the record

supports a finding that the night shift supervisors possess supervisory authority based on their responsible direction of the CENAs. The record contains a number of CAP write-ups issued to CENAs by night shift supervisors. I find that the night shift supervisors are likewise statutory supervisors as they possess the same authority to discipline CENAs as described above.

Conclusion

In view of the foregoing, and the record as a whole, I conclude that the nurses exercise authority in the interest of the Employer which requires the use of independent judgment regarding their authority to responsibly direct and discipline employees. Accordingly, I find that the nurses are supervisors within the meaning of Section 2(11) of the Act. Thus, the petitioned-for units are not appropriate for the purposes of collective bargaining and I shall dismiss the petitions.

ORDER

IT IS ORDERED that the petitions are dismissed.

Dated at Detroit, Michigan, this 15th day of January 2009.

(SEAL)

/s/ Stephen M. Glasser

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RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **January 29, 2009**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlrb.gov**,¹⁶ but may **not** be filed by facsimile.

¹⁶ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.